IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

MACON COUNTY INVESTMENTS, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	CASE NO. 3:06-CV-224-WKW
DAVID WARREN,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This cause is before the Court on Plaintiffs Macon County Investments, Inc. ("MCII") and Reach One, Teach One of America, Inc's. ("Reach One") Motion For Early Commencement of Discovery (Doc. # 2) and Motion for a Preliminary Injunction and Expedited Hearing (Doc. # 3); and on defendant Sheriff David Warren's ("Sheriff Warren") Motion to Dismiss (Doc. # 8). Plaintiffs bring this action for injunctive relief and declaratory judgment alleging violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by Sheriff Warren with respect to an application for a bingo license in Macon County. For reasons to be discussed, the motion for Early Commencement of Discovery is due to be granted, and the Motion for Preliminary Injunction and Expedited Hearing and defendant's Motion to Dismiss are due to be denied.

I. FACTS AND PROCEDURAL HISTORY

In a November 4, 2003 statewide election, the voters of Alabama approved Amendment 744 to the Constitution of the State of Alabama 1901, which allowed the operation of bingo games for prizes or money in Macon County, Alabama by a non-profit association. The Amendment was ratified June 11, 2004. The Amendment provided, in part:

> The operation of bingo games for prizes or money by non-profit organizations for charitable, educational, or other lawful purposes shall be legal in Macon County. The Sheriff shall promulgate rules and regulations for the licensing and operation of bingo games within the county. The Sheriff shall insure compliance pursuant to any rule or regulation . . . .

On December 5, 2003, Sheriff Warren promulgated the "Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, Alabama" (the "2003 Rules"). The 2003 Rules provided for two classes of bingo: Class A Bingo is defined as "paper card bingo only at a qualified location." (Doc. # 9-2, pp. 1-2.) Class B Bingo is defined as "any and all games of bingo as defined herein above, at a qualified location." (Doc. # 9-2, pp. 1-2.) The 2003 Rules required a Class B license applicant to provide to Sheriff Warren "satisfactory evidence that the owner or owners of the location paid at least $5,000,000 for the land, building and other capital improvements (before depreciation) comprising said location or the value of said land, buildings and other capital improvements (before depreciation) must be at least $5,000,000." The 2003 Rules had no restriction on the number of applicants; any charitable or educational organization could apply for a Class B bingo license.

On June 2, 2004, Sheriff Warren promulgated the "First Amended and Restated Rules and Regulations For the Licensing and Operation of Bingo Games in Macon County, Alabama" (the "First Amended Rules"). Among other amendments, pertinent to the present action were two amendments wherein the capital improvement minimum was raised to $15,000,000, and an additional requirement was added: "No Class B Licensees shall be authorized to operate bingo at any qualified location, as defined herein, unless a minimum of fifteen (15) applicants shall first obtain Class B Licenses for such location." (Doc. # 9-3, § 2.) On January 1, 2005, Sheriff Warren promulgated the "Second Amended and Restated Rules and Regulations for the Licensing and Operation of Bingo Games in Macon County, Alabama (the "Second Amended Rules") establishing for the first time a maximum of 60 licensees for Class B bingo licenses. In July, 2005, Plaintiff Reach One filed an application with Sheriff Warren for a Class B Bingo License. The application has been neither granted nor denied. This action was filed on March 9, 2006, alleging that the First Amended Rules and the Second Amended Rules issued by Sheriff Warren were issued without a rational basis, but are instead arbitrary and capricious, thereby denying plaintiffs equal protection under the law in violation of the Fourteenth Amendment. Specifically, plaintiffs claim they are being denied the right to operate a Class B bingo facility in Macon County as allowed by Amendment 744 to the Constitution of the State of Alabama.

Plaintiffs seek preliminary and permanent injunctive relief prohibiting Sheriff Warren from further operating under the First or Second Amended Rules; compelling Sheriff Warren to grant plaintiffs' application for a Class B Bingo License; for declaratory judgment declaring the First and Second Amended Rules null and void; and for reasonable costs and expenses, including reasonable attorney fees, and for other equitable relief. With their complaint, plaintiffs have requested a preliminary injunction and expedited hearing, and early commencement of discovery. Sheriff Warren has moved to dismiss the complaint in its entirety.

II. STANDARD OF REVIEW

A court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations in the complaint. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Wright v. Newsome*, 795 F.2d 964, 967 (11th Cir. 1986) ("[W]e may not . . . [dismiss] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle him or her to relief."). In evaluating a motion to dismiss, the Court will accept as true all well-pleaded factual allegations and reasonable inferences drawn from those facts and will view them in a light most favorable to the nonmoving party. *Hishon*, 467 U.S. at 73; *see also Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992).

With respect to motions to dismiss for lack of standing, "general factual allegations of injury resulting from the defendant's conduct" are sufficient to establish standing at the motion to dismiss stage. *Florida Interest Pub. Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1083 (11th Cir. 2004).

III. DISCUSSION

A. Defendant's Motion to Dismiss

Sheriff Warren's Motion to Dismiss is grounded first in his claim that this Court lacks subject matter jurisdiction over this dispute. Sheriff Warren also alleges that the plaintiffs fail to adequately state an equal protection claim. The Court will address each of these grounds separately.

Sheriff Warren first argues that the complaint is due to be dismissed because plaintiffs' claims are not ripe for adjudication and are moot. He concludes that this Court therefore lacks subject matter jurisdiction. In support of this contention, Sheriff Warren argues that plaintiffs' application is incomplete; that he has not yet granted or denied the application; and that any injury alleged by the plaintiffs is merely speculative or contingent rather than actual or imminent.

The plaintiffs reply that their claims are ripe for adjudication because they are applicants who are challenging the constitutionality of the First and Second Amended Rules, and that a denial of their application by Sheriff Warren is not required as a prerequisite to stating a claim for which relief can be granted.[1] They allege that Sheriff Warren's extended period of silence regarding the application "can be reasonably taken as a denial . . . ." (Doc. # 17-1, p. 11.)[2]

Sheriff Warren's arguments concerning jurisdiction are founded in facts not before the Court. Without the benefit of discovery, the ripeness and mootness arguments do not support dismissal at this juncture of the proceedings. These issues are more properly addressed after an opportunity to consider a broader factual record.

Sheriff Warren's second ground for dismissal is the plaintiffs' failure to state a cause of action under Fed. R. Civ. P. Rule 12(b)(6) for violation of the Equal Protection Clause. Sheriff Warren correctly establishes that "[b]ecause the present case involves neither a fundamental right nor a suspect class, analysis under the rational basis test is appropriate." (Br. at 20.) As stated in *Gary v. City of Warner Robins,* 311 F.3d 1334 (11th Cir. 2002):

> When legislation classifies persons in such a way that they receive different treatment under the law, the degree of scrutiny the court applies depends upon the basis of the classification. If a fundamental right or a suspect class is involved, the court reviews the classification under strict scrutiny. If an ordinance does not infringe upon a fundamental right or target a protective class, equal protection claims relating to it are judged under the rational basis test; specifically, the ordinance must be rationally related to the achievement of a legitimate government purpose.

Id. at 1337 (internal citations and quotation marks omitted). Plaintiffs agree, and allege that there is no rational basis for the adoption of the First or Seconded Amended Rules.

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[1] Sheriff Warren also argues that MCII is not an applicant and did not claim to be in the complaint. While it is true that the complaint does not specifically allege MCII is an applicant, Plaintiffs' Application for Preliminary Injunction and Expedited Hearing (Doc. #3), filed simultaneously with the complaint, contains the following paragraph under "Factual Basis:" "8. Since July 2005, MCII and Reach One Teach One have had an application for a Class B Bingo license pending in the office of the Macon County Sheriff." MCII will be dismissed without prejudice with leave to amend the complaint to properly allege the status of MCII.

[2] Upon review of all the rules and regulations in question, and by the admission of Sheriff Warren's counsel at the status conference held on May 16, 2006, no version of the rules establishes a deadline by which Sheriff Warren is required to rule on an application.

In response, Sheriff Warren prematurely urges the Court to examine and accept his rationale for adoption of the amended rules. He would have the issue decided largely on the basis of unsupported news releases relating to the Alabama Attorney General's comments about gambling in this state. Not only is this information inadmissible in form, but it is unavailable as a basis upon which to grant a Rule 12(b)(6) motion to dismiss.[3] When plaintiffs allege, as in this case, that they have been intentionally treated differently from others similarly situated, and that there is no rational basis for the difference in treatment, the threshold for pleading the equal protection violation is met. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("[T]he purpose of the Equal Protection Clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.").

The Court finds that the arguments of Sheriff Warren go to the merits of the case and can only be appropriately addressed after discovery, either in a hearing for preliminary injunction or upon a properly supported motion for summary judgment.

B. Plaintiffs' Application For Preliminary Injunction and Expedited Hearing

Under Fed. R. Civ. P. 65, a movant for a preliminary injunction must establish the following elements to support the remedy: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the preliminary injunction is not granted; (3) that the threat and injury

[3] In resolving a motion to dismiss, a "district court must either limit itself to the allegations within the pleading or at its discretion, treat the motion as one for summary judgment . . . ." *Universal Express, Inc. v. SEC*, ___ F.3d ___, 2006 WL 1004381, at *1 (11th Cir. Apr. 18, 2006). The Court opts not to convert the motion into one for summary judgment.

outweighs the harm that an injunction may cause the defendant; and (4) that the injunction would not be adverse to the public interest. The movant is charged with the burden of persuasion as to all four factors. *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005).

For good cause shown, the Court will allow limited discovery prior to holding a hearing on the application for preliminary injunction. Upon completion of the discovery, and upon renewal of plaintiffs' application for preliminary relief setting forth the specific factual basis for each of the Rule 65 elements in support of the motion, the Court will set a hearing with a briefing schedule to be completed prior to the hearing. The Plaintiffs' Application for Preliminary Injunction and Expedited Hearing is therefore due to be denied with leave to refile as indicated.

C. Plaintiffs' Motion for Early Commencement of Discovery

Plaintiffs request commencement of discovery before a scheduling order has been entered and before a Fed. R. Civ. P. Rule 26 planning meeting has been conducted, incorporating into their request the allegations of their complaint and application for preliminary injunctive relief. Rule 26(d) generally provides that formal discovery will not commence until the required Rule 26(f) conference has been conducted. However, the Court has broad discretion to alter the timing, sequence, and volume of discovery upon a showing of good cause for the requested departure from usual discovery procedures. *Qwest Commc'n Int'l, Inc. v. World Quest Networks, Inc.*, 213 F.R.D. 418, 419 (D. Col. 2003). "The good cause standard may be satisfied where a party seeks a preliminary injunction . . . ." *Id.* at 419 (citations omitted). The factors to be considered in an application for expedited discovery are similar to those for preliminary injunctive relief: (1) irreparable injury; (2) some probability of success on the merits; (3) some connection between the expedited discovery and the avoidance of the irreparable injury; and (4) some evidence that the potential injury resulting from no expedited discovery is greater than the injury that the defendant will suffer if the expedited relief is granted. *Cecere v. County Nassau*, 258 F. Supp. 2d 184, 186 (E.D.N.Y. 2003). This Court cannot say as a matter of law, under the facts alleged and after a preliminary review of the rules promulgated by Sheriff Warren, that the plaintiff has no probability of success on the merits. The Court also comprehends some connection between the expedited discovery and the avoidance of the irreparable injury in the delay of Sheriff Warren in ruling upon their application for a license, and the apparent lack of communication regarding whether the application is complete and what is required to render it complete. With respect to the last element, Sheriff Warren's argument that he will suffer an injury in having to produce documents regarding the matter is unpersuasive. The case will certainly proceed to a stage at which all of Sheriff Warren's documents relevant to the issues raised will have to be produced. In order to address the request for preliminary injunctive relief, that production will be sooner rather than later. Having found that the motion to dismiss and motion for injunctive relief are premature without discovery, the plaintiffs' motion for early commencement of discovery will be granted as follows:

(1) Depositions of Sheriff Warren first, and the corporate representatives of Reach One and MCII (at the election of Sheriff Warren) shall be allowed. Plaintiffs shall have eight hours to depose Sheriff Warren. Sheriff Warren shall have a total of eight hours to depose both corporate representatives,[4] the time to divided in any fashion suitable to Sheriff Warren. Depositions shall be completed by August 31, 2006.

(2) Plaintiff Reach One (and MCII if properly amended into the case) may propound not

[4] If MCII is not amended in as a plaintiff, Sheriff Warren is allowed process by subpoena to compel the deposition of the corporate representative of MCII.

more than 30 requests for admissions to Sheriff Warren. Sheriff Warren may propound not more than 30 requests for admissions to each plaintiff (to include MCII if properly amended back into the case).

(3) Each party may serve a request for production of documents on each opposing party for response and delivery of the requested documents at least three days prior to scheduled depositions. If MCII is not amended into the case, Sheriff Warren may subpoena the records of MCII for production three days prior to deposing its corporate representative.

(4) Except for timing and scope of discovery as ordered herein, the limited discovery allowed shall proceed strictly according to the Federal Rules of Civil Procedure.

IV. CONCLUSION

For the foregoing reasons, it is hereby ORDERED that:

(1) Defendant Sheriff Warren's Motion to Dismiss is GRANTED as to Macon County Investments, Inc.; otherwise, the Motion to Dismiss is DENIED;

(2) Plaintiff is given leave until July 7, 2006 to amend the complaint to properly identify the status of Macon County Investments, Inc. for purposes of standing;

(3) Plaintiffs' Application for Preliminary Injunction and Expedited Hearing is DENIED, with leave to refile as set forth above;

(4) Plaintiffs' Motion for Early Commencement of Discovery is GRANTED as set forth above.

DONE this the 26th day of June, 2006.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE